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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 547

ERNEST TRIPLETT,
Petitioner

vs.

STATE OF IOWA,
Respondent

On Writ of Certiorari to the
Supreme Court of the State of Iowa

RESPONDENT'S BRIEF

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OPINION BELOW

The opinion of the Supreme Court of the State of Iowa is reported in 79 N. W. 2d 391.

QUESTIONS PRESENTED FOR REVIEW

This court granted the Petition for Writ of Certiorari to the Supreme Court of the State of Iowa, limited to the following questions:

1. Was the defendant denied due process of law by the admission into evidence at his trial of a confession which was taken from him while in custody but before arraignment and without consultation with an attorney which he steadfastly refused to call?

2. Where a defendant refuses to avail himself of the services of an attorney when offered him on numerous occasions while in custody, can such lack of legal assistance then be held to be a denial of his rights under the sixth amendment to the Federal Constitution?

STATEMENT OF THE CASE

A. IN GENERAL

Testimony of the trial of the defendant herein reveals that he had been working in Sioux City for a few weeks when eight-year-old Jimmy Bremmers disappeared from his home (in Sioux City) about 8:00 p.m. on August 31, 1954. Defendant was employed as a door-to-door salesman or solicitor of business by a music store, his primary duties being to interest parents in music lessons for their children. He had been working in the neighborhood where Jimmy Bremmers resided with his parents on August 31st.

When the disappearance of the Bremmers boy had become generally known, and a considerable search instituted, the Police Department of Sioux City received word that a salesman for the defendant's employer had been soliciting business in the Bremmers' neighborhood on August 31. Officers thereupon called on the employer, learned that the defendant was the employee who had been in that part of the city, and took him to the police station for questioning on September 2.

On September 15 he volunteered to go, and was taken to the Cherokee Mental Health Institute (R. 109). Testimony of police officers is that he said he thought they might be able to aid him there by treating him for syphilis. There is also testimony that on three or four occasions he said he did not want a lawyer; that he wanted to help solve the boy's disappearance. There is testimony also that on September 4, when all that was known of the matter was that the boy was missing, that defendant said he was interested in cooperating in every way in clearing up "this murder"; and when asked why he referred to it as a "murder" he made no reply.

Quoting from the Iowa Court's Opinion (79 N. W. 2d at 394), we find:

"While the defendant was at the Cherokee hospital the body of Jimmy Bremmers was found. Thereupon he was taken from the hospital by police officers and to the place

where the body was found. The roadway here is considerably below the level of the field in which the body lay, a short distance from the fence. It was not visible from the road. When the car stopped, there is evidence he at once went in a diagonal direction up the bank to a point outside the fence nearest to the body, without direction from anyone. When he saw the body he turned pale and said 'What is that?'

"After viewing the body the defendant was taken to the Sioux City police station and kept there for a few days. On October 1 he was visited at the jail by Stanley Corbett, president of the Sioux City Bar Association. Mr. Corbett advised him that *if he was being held against his will* he was entitled to seek a writ of habeas corpus and the bar association would furnish him counsel. Mr. Corbett testified: '*He said he was not held against his will* and he wanted to help the police solve the murder. I told him the bar association would furnish him counsel but he said he did not want to leave the jail or the hospital, whichever place he might be.' On cross-examination the witness said that the defendant gave two reasons for staying there: he had no other place to go and he wanted to stay there and work for the police chief in attempting to solve 'this murder'.

"The defendant was then returned to the Cherokee institution, where on October 6th he confessed to the commission of the crime. The confession was obtained by Dr. Azordegan, one of the hospital physicians. Most of the material questioning was done by Dr. Azordegan, in the presence of police officers and of one Bill Sanguin, a hospital attendant who operated a tape recording device. This recording was upon the trial played to the jury."

B. TESTIMONY CONCERNING THE PERIOD OF CUSTODY FROM ARREST TO ARRAIGNMENT

1. STATES EVIDENCE;

LIEUTENANT OF DETECTIVES WILLIAM A. DENNISON testified: That he was present at the time the tape recording was made in Cherokee at the Mental Health In-

stitute; that during the time Mr. Triplett was in custody he slept regularly and was not interviewed for any sustained period of time; that Mr. Triplett was of normal mentality and could not be led, (R, 7, R, 98); that he said; "I want to go along with you boys, I want to cooperate with you"; that he did not threaten or entice the defendant to tell him what he knew but rather that he asked him to go over the activities of the night the boy was missing; that Triplett volunteered to go to the Mental Health Institute at Cherokee, Iowa, for observation and treatment of syphilis (R, 97); that on three or four occasions he asked Triplett if he wanted a lawyer and the defendant said he did not want any lawyer (R, 97); that there was never any physical force used on Mr. Triplett and at the time the tape recording was taken at Cherokee there were never any promises or threats made to him in his presence; that he did not expect a confession the day he went down to the Mental Health Institute; that the defendant admitted the actual killing of the boy at the Cherokee Mental Health Institute; that he took a statement from him (the defendant) to the effect that "I don't want a lawyer to represent me while you are holding me here in custody without any charge. I just want to sit here or stand here. I like it here." (R, 25, 110); that without threat, promise or inducement he asked to be put under observation and receive treatment at the Mental Health Institute where he went on September 15 (R, 109); that the questioning sessions of the defendant during the time he was held in custody never lasted more than three hours between eight in the morning and five o'clock in the afternoon and rarely was it ever over more than one hour (R, 109, 110); that during the afternoon of the conference he did not hear any threats or promises being made to Mr. Triplett by the attending physician and that the statements made by the defendant were made voluntarily at about one o'clock in the afternoon of October 6, 1954 at the Mental Health Institute (R, 27, 111).

Dennison also testified at length about the details of the period during which the confession was going on (R, 26-30, 111-112, see also R, pp. 35, 36, 114, 32, 33, 54, 55, 121, 122).

CHIEF OF DETECTIVES HARRY J. GIBBONS testified: That he was present in Cherokee at the time of the Triplett confession (R, 13) and that he himself asked Triplett the question as to whether his statement was free and voluntary and that Triplett agreed that it was; that Triplett voluntarily committed himself for treatment at the Mental Health Institute (R, 22, 106); that he heard no threats or promises made to Triplett on the date of the confession and that he knew of his own knowledge that it was given of his own accord; that Dr. Azordegan stated that Triplett wanted to talk to the officers and tell them the truth about the Bremmers boy (R, 30, 31).

The then SIOUX CITY BAR ASSOCIATION PRESIDENT, STANLEY M. CORBETT, testified that he informed Mr. Triplett that if he was being held against his will he was entitled to seek a writ of habeas corpus, that he would get the assistance of an attorney for him, but that Triplett insisted he did not want to leave the jail or the hospital, whichever place he might be, stating that he had no other place to go and that he wanted to stay there and work for Mr. Gibbons in attempting to solve this murder; that he had not been mistreated at any time either in the jail in Sioux City or in the hospital at Cherokee, that he expected to go back to Cherokee for further treatment and then come back to help the police at Sioux City in connection with the case (R, 14, 100-101).

CHIEF OF SIOUX CITY POLICE, RUSSELL H. WHITE, testified that he had interviewed Mr. Triplett on a number of occasions, that Mr. Triplett was normal with respect to mentality and alertness and "probably as hard a person to interrogate as I have ever encountered. He is very alert. I don't think anybody during my time of being with him and listening to him ever was ahead of Ernie Triplett on interrogation." (R, 15, 16); that he never made any promises or threats to the defendant and that no one else did in his presence (R, 18); that Triplett was of average intelligence, exceedingly alert and his mind was not easily led or swayed (R, 104).

MENTAL HEALTH INSTITUTE EMPLOYEE BILL SANGUIN testified: That he was employed at the Mental Health Institute during the month of October, 1954, and was present at the interview of Mr. Triplett on October [illegible]; that he made the recording and that the recording instrument was in plain sight of Mr. Triplett and that the tape was an accurate recording of all that took place at the interview (R, 56, 119, 120).

CAPTAIN OF SIOUX CITY POLICE JOSEPH DAVIDCHIK testified that he had a conversation with Triplett on September 4 and that Triplett was not questioned on that occasion or any other after the hour of ten o'clock p.m. and that no one ever questioned him as early as two a.m. in the morning and that nobody interviewed him before seven a.m. the days he was on duty. (R, 17, 102, 103).

DEFENDANT ERNEST J. TRIPLETT testified that Dr. Azordegan interviewed him prior to the officer from Sioux City arriving to take the tape recording and that in that interview the doctor promised him that he was in the Mental Health Institute indefinitely but that if he signed a confession in a year or two he could let him out. That he knew that Dr. Azordegan was out of the country, could not testify to the contrary, that he did not remember Dr. Azordegan asking him questions to the effect that his testimony to them was voluntary and that he did not think he could recall saying it even if he heard the recording. (R, 9, 10, 99).

2. DEFENDANT'S TESTIMONY.

PRIVATE DETECTIVE JOSEPH MATOUSEC testified that the Sioux City police allowed him to interview Triplett for the better part of two hours in early September at which time he was not employed by anyone; that he was now in the employ of Mr. Tacy in behalf of Mr. Triplett; that he attempted to induce Triplett to give him details of the crime by promises of treatment at the Mental Hospital and securing him a lawyer; that the Bar Association did appoint one for him about a week later (R, 10-13, 100).

DEFENDANT ERNEST TRIPLETT testified that he was grilled every day for two days straight (R, 64); that

Matousec interviewed him and promised an attorney and treatment at the Cherokee hospital if he would confess the crime; that he was interviewed quite a few times while held in custody (R, 65) and that some of the questioning took place in the nighttime from 2:30 in the morning on and that he was roused from his bed for these interviews (R, 55, 56); that he was given coffee, and interviewed by one man who was so big he was afraid of him, who told him that he would beat him up if he didn't tell the truth, but that "the other boys were nice" to him (R, 66); that at Cherokee he was given a medicine and promised by Azordegan "I am going to help you out if you plead guilty." (R, 66, 67); that "I was taking different kinds of medicine down there. I got on quite a few drunks. I don't know the medicine but I got it. He said it would help me out and he would get me finally on a job over there and that I wouldn't be in there any more than about two years. And I thought, 'well, if he knows what he's talking about I'll let him help me out.' "; that he didn't feel natural at the time the recording was made; that he went over his story with Dr. Azordegan before the interview on tape recorder; that Azordegan told him exactly what to say and that he never changed it, but that he couldn't get Dr. Azordegan's story down very good; that he told Azordegan that he was not guilty but that he would go ahead with the story and see how it worked out, and repudiated the entire confession: "Why no, they (statements on the tape recording) are false. I mean that's all, they're just false. I never killed the kid." (R, 68); that he did not ask to be taken into a court because "I thought they would come to that, but they were definitely stuck on keeping me there, but a lack of funds, you can't very well bring it into court because there was no charges."; that he agreed with Azordegan on what he was to say on the tape recording and that the things in that tape recording admitted about unnatural sex habits "was something that the doctor and I agreed on before we went in there. I didn't even know they had a tape recording. I could beat them out easy without a tape recorder." (R, 70); that he slept on a steel mesh bed for some days before getting a mattress

in jail in Sioux City (R, 71); that though it was his signature on Exhibits Q to Q-7 "I wasn't under oath when I put my signature on there though. I can testify different than that and get by with it; just roll it around."; and on being asked to identify said exhibits answered, "I haven't got no glasses on. I deny everything on my constitutional rights, right there; everything you've got I deny; try and prove it." and again "I would like to read those over, I don't know how much you have got in there (Exhibits Q to Q-7). I claim my constitutional rights not to answer those questions." (R, 74, 125); that he remembered talking to Mr. Stanley Corbett and that he turned down Mr. Corbett's offer of legal assistance because "right then and there I was trying to prove to the detective force that I wasn't guilty and I figured they would turn me loose; but they made a steady customer out of me. He said if I wanted an attorney he would get me one but Mr. Gibbons said it would not be nice for me to get out on the street and let the public get ahold of me because he said 'what they won't do to you.' So I didn't have nowhere to go I might as well stay and fight it out with them."; that he did not request to go to the Mental Health Institute at Cherokee but that witness Gibbons forced him to make such a request and, again, with respect to Mr. Corbett's testimony:

> "Q. Would you state whether or not you told this gentleman who on October 4, ask you if you wanted an attorney, about whom you testified before,—Answer, Corbett? I don't remember telling him anything like that." (R, 75).

In answering a question that he couldn't remember much of anything he told the police in the early days of his arrest he said, "That's right. I'm denying everything I told the police. Now if you want the truth of it that's it." Question: Are you lying now or when you talked to the police? Answer: "I'm sworn in here. You ain't goin' to get me for perjury." (R, 74, 129) Again referring to the visit by the Sioux City Bar Association president, Mr. Corbett:

> "Question: And did he on that occasion tell you if you wanted one he would furnish a member of the Sioux

City Bar of your choice? Answer: I did not know anybody. How could I get a choice? Question: Did he say he would furnish you with an attorney if you wanted one? Answer: I can't look through his eyes. Question: Did he ask you that? Answer: I imagine he did. Question: What did you answer him? Answer: I told him there wasn't no charges filed against me yet so I didn't know whether I needed a lawyer; I thought I might need three if they ever got around to filing a charge.";

that he got himself into a court room anyway and that

"they didn't bury me over in Cherokee for the rest of my life. Yesterday I testified about visiting the scene with certain officers where the body of Jimmy Bremmers had been found." Question: Would you tell us what you recall seeing out there? (Defendant claims his rights under Constitution of the United States and of Iowa. Sustained.) (R, 75, 130)"

He said he had no personal grievance against the police in Sioux City (R, 130); that with respect to questioning by the Sioux City police,

"The only voluntary statement I made as to seeing Jimmy Bremmers was that I saw some children playing in the Meisch yard and I thought one of them might have been him; but I gave them a fabulous story on that—I gave them a fabulous story that other." Question: Mr. Triplett, do you have any reason why that you under serious questioning for day after day that you do wear out rather easily? Answer: Well, I wouldn't say I wore out too easily. I put a few of the big boys to sleep down there on the desk. After I got down to Cherokee, they appeared to take this tape recording. I got the same amount of sleep there. I never check my sleep or eats any. No, and it didn't bother me too much. (R, 133)

Finally, Triplett concluded saying that he couldn't state truthfully whether or not a tape recording had been made (R, 76) but that he had been there a week and a half before the tape recording was made. (R, 76)

3. THE COURT MADE THE FOLLOWING RECORD:

"The Court: Well, I think that we are all of the opinion that it has repeatedly and quite consistently held that mere exhortation to tell the truth are not a bar to a confession. Here, apparently, there have been no threats of reprisal, threats of physical harm or violence, no oppression, and the arguments in connection with this matter apparently assumed that some promise, or some reference of treatment might result if confessions were made, were in fact made. Of course, the jury is not bound to accept the testimony of any witness as absolutely true, even if the testimony is in no respect controverted; and they should not do so if, for any reason they believe the testimony is untrue or unreliable. It is the sole province of the jury to determine the weight and credibility of testimony, and, perhaps in a pre (fol. 27) liminary hearing such as this, that is the province of the court.

"I am decidedly of the opinion that there is a jury question here, and I think the motion or request to exclude the confession should be, and the same is denied and overruled, and I think the' should be admitted in evidence, and the jury under proper or what I consider to be proper instructions, be permitted to determine from the evidence whether they should give consideration to the admissions and confessions, on the finding that they were freely and voluntarily made, without any hope or promise of reward or fear of reprisal. So, they will be admitted in evidence; and the Court will endeavor to properly instruct the jury."

ARGUMENT

DIVISION I

The question of whether or not a pre-arraignment confession of guilt by one held in custody is admissible without violation of his rights under the Fourteenth Amendment to the Federal Constitution has been considered by this Court on many occasions. Simply put, the question turns on whether or not the confession was freely given.

However, first, it should be pointed out that in *U. S. v. Mitchell*, 322 U. S. 65, 88 L. Ed. 1140, 64 S. Ct. 986, this Court established clearly that in reviewing such questions its power over State courts was narrower than that which it exercises over the lower Federal courts. As to the State courts its sole authority is to determine whether the inherent safeguards of the Fourteenth Amendment to the Federal Constitution have been transgressed. See also *McNabb v. U. S.*, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608, Reh. den. 319 U. S. 784, 87 L. Ed. 1727, 63 S. Ct. 1322.

In Iowa the sole test of the admissibility of a confession or an admission is whether it was made freely and voluntarily and without compulsion or inducement of any kind. *State v. Case*, 247 Iowa 1019, 75 N.W. 2d 233; *State v. Crisman*, 244 Iowa 590, 57 N.W. 2d 207. And the burden is on the accused to show that his confession or admission, whether it be oral, written or a wire or other recording and which on its face purports to be freely and voluntarily given, is incompetent as evidence and that it was involuntarily given. *State v. Crisman*, supra; *State v. Hofer*, 238 Iowa 820, 28 N.W. 2d 475.

The fact that a suspect has been held without charge or arraignment for several days, while not to be condoned, does not in itself render a confession involuntary, this being a matter of practice rather than of constitutional right. *State v. Triplett*, 248 Iowa —, 79 N.W. 2d 391; *State v. Case* supra; *State v. Williams*, 245 Iowa 494, 62 N.W. 2d 742; *State v. Archer*, 244 Iowa 1045, 58 N.W. 2d 44; *Gallegos v. Nebraska*, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86.

In attempting to measure the facts for "voluntariness" this Court has established various indicators as bearing on whether or not a confession was in fact freely given. In the instant case Petitioner seems to be complaining on two such grounds. In Division I of his argument he appears to allege that the confession was induced both by intimidation and promise, coupled with a lengthy period of police custody prior to arraignment, and that this combination of circumstances made the confession obtained in the interim involuntary and thus inadmissible.

Defendant was arrested on September 2, 1954, and held for thirteen days by police without charge during which time he was questioned almost daily, although the evidence and the Trial Court (R, 16) both indicated that this was neither at great length nor without ample food and rest between interviews.

There is testimony that during this time he was asked repeatedly if he wanted counsel and he insisted that he did not and that he wanted to help solve this case.

On September 15 he was taken voluntarily to the Cherokee Mental Health Institute where he was treated for syphilis, after which he was returned to Sioux City police custody. He was then visited by Mr. Stanley M. Corbett, president of the Sioux City Bar Association, who told him several lawyers would be glad to offer their services, but he refused saying that he had no place else to go; liked the jail because he was treated well there, and wanted to help solve the murder and return to Cherokee for more treatment (R, 14, 138, 139). Thereafter, he returned to Cherokee where he made the tape recorded confession to a psychiatrist at the hospital, in the presence of a hospital attendant, who operated the recording machine, and representatives of the Sioux City Police Department, whereupon he was charged with murder.

In *Lyons v. Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481, 64 S. Ct. 1208, the following language appears:

"Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the

McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. It is beyond question that if the triers of fact accepted as true the evidence of the immediate events at McAlester, which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary; * * *"

The Iowa Court, in its decision, 79 N.W. 2nd at 396 stated:

"* * * On the whole record we think the question of voluntariness was properly submitted to the jury, and its determination must be final."

The triers of fact found that irrespective of the defendant's contrary testimony the confession was voluntary.

The review of such finding by this court was delimited in its decision in *Stein v. New York*, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, Rehearing denied 346 U. S. 842, 98 L. Ed. 362, 74 S. Ct. 13, where you appear to say that issues of fact are virtually conclusively determined in the State courts:

"When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. *Galiegos v. Nebraska*, 342 U.S. 55, 60, 96 L. Ed. 86, 91, 72 S. Ct. 141; *Lyons v. Oklahoma*, 322 U.S. 596, 602, 603, 88 L. Ed. 1481, 1485, 1486, 64 S. Ct. 1208; *Lysenba v. California*, 314 U.S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

"Accordingly, we accept this verdict and judgment as a permissible resolution of contradictions in evidence or conflicting inferences unless, as is urged, undisputed facts indicate use of incorrect constitutional standards of judgment. This may best be determined by separate examination of the following conclusions, implicit in the judgments below: (1) that these confessions were not extorted by physical coercion; (2) that these confessions were not extorted by methods which, though short of physical coercion, were so op-

pressive as to render the confessions inadmissible; and (3) that *admitted illegal detention of petitioners at the time of the confessions did not render them inadmissible.*" (Emphasis ours.)

We turn then to the period prior to arraignment.

In *Lyseuba v. California*, 314 U.S. 219, 86 L. Ed. 166, 62 S. Ct. 280, Rehearing denied 315 U.S. 826, 86 L. Ed. 1222, 62 S. Ct. 620, the following language appears:

"Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officers of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavered fairly to set them forth, and in the light of the findings in the State courts, we cannot hold that the illegal conduct in which the law enforcement officers of California indulged by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions the introduction of which is the infringement of due process of which the petitioner complains. * * *"

The Iowa Court in the instant case also pointed this out in 79 N.W. 2d at page 395:

"* * * Of course the length of time he was held in custody without being taken before a magistrate to answer to a charge duly filed was much too long. Such a practice cannot be approved. But we have held that this, in itself, does not render a confession involuntary. It is an indicia of violation of constitutional rights but not conclusive proof. * * * Under the circumstances here, where there is substantial evidence that the defendant preferred to stay in the jail or the mental hospital, and refused an offer of legal aid when it was tendered to him several days before the con-

fession was made, we cannot say the detention without charge did more than make a question of lack of due process through involuntariness of the confession, for the jury."

In *Gallegos v. Nebraska*, 342 U.S. 55, 96 L. Ed. 86, 72 S. Ct. 141, where an illiterate farmhand was held fifteen days without counsel, or preliminary appearance before a magistrate, it was held that while such prolonged detention should be considered in determining the admissibility of a confession obtained during that period, that under the facts there was no abuse of due process.

This was no illiterate Mexican farmhand, but one who had engaged in business dealings and whose very testimony gave evidence of his articulate alertness, and who is confronted by the overwhelming testimony of a disinterested bar association president who undisputedly offered the services of several attorneys and who attests to defendant's refusal thereof, *prior* to the confession defendant seeks to have barred.

In a habeas corpus action, *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397, this Court held that the confession obtained from an illiterate while held in custody eighteen days without benefit of counsel before arraignment was properly admitted in State court where there was no showing of physical coercion and he was not denied the right of counsel.

In the instant case defendant was not only not denied the right of counsel but asked on numerous occasions throughout his detention if he wanted an attorney which he repeatedly refused.

As was pointed out in *Lyons v. Oklahoma*, cited supra, fn. 2, L. Ed., "In petitioner's brief a claim is made that Oklahoma denied to him the equal protection of the laws guaranteed by the Fourteenth Amendment. Apparently petitioner relies upon his undue detention without preliminary examination, which was in violation of the state criminal procedure as a denial by Oklahoma of equal protection of the law.

"But the effect of the mere denial of a prompt examining trial is a matter of state, not of federal, law. To

refuse this is not a denial of equal protection under the Fourteenth Amendment although it is a fact for consideration on an allegation that a confession used at the trial was coerced. * * *"

DIVISION II

Petitioner also contends that his right to counsel under the Sixth Amendment was abused for lack of counsel prior to arraignment.

Of course, the State first relies upon the devastating testimony of attorney Corbett, then president of the Sioux City Bar Association, who (prior to the confession) offered to furnish defendant with counsel which he steadfastly refused (R, 14, 100, 138, 139) as he had done previously with officer Dennison (R, 25, 97).

Petitioner gives as his reason for not wanting counsel that he was afraid of mob violence. It hardly follows that engaging an attorney would bring mob action down upon the defendant. Even if getting an attorney could be considered tantamount to his release from custody, which presumably would be the only time he might have to fear violence, certainly he could have an attorney without exercising his possible right to any action for temporary release from custody.

The Supreme Court of Iowa adequately answered the contention that the threat of mob violence went unchallenged in the record in answering a similar challenge as to absence of contradictory evidence by the State when it said, "But the jury was not bound to take defendant's testimony as true, even in the absence of contradiction. We have repeatedly so held. * * *" 79 N.W. 2d at 395.

In the case of *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55, this court proclaimed again the right of a defendant to counsel at every stage of the proceedings. But it is pointed out therein that the critical period of the proceedings is from arraignment to trial. (See also *Avery v. Alabama*, 308 U.S. 444 at 450, 84 L. Ed 377, 60 S. Ct. 321. To the same effect.)

Defendant here makes no assertion of lack of counsel at

or after arraignment. The State feels in view of the Dennison and Corbett testimony indicating almost conclusive proof of continued resistance to offers of legal assistance, that the defendant clearly waived his undoubted right to confer with counsel during the period in question.

The question doesn't differ greatly in substance from the recent case of *U. S. v. Bando*, 244 F.2d 833, where one of the defendants prior to arraignment who had been told he could have a lawyer, went ahead and made a confession. The U. S. Court of Appeals, Second Circuit, held that since the confession had been freely given no constitutional rights were violated. It has even been held that where a defendant pleaded on arraignment without counsel having been appointed no abridgment of defendant's rights under the Sixth Amendment occurred. Council v. Clemmer, 177 F. 2d 22, 85 U.S. App. D. C. 74, Cert. den. 70 S. Ct. 150, 338 U.S. 88, 94 L. Ed. 540.

As we understand the test of whether a conviction is vitiated by defendant's being without the services of counsel in the pre-arraignment period, a showing would have to be made that this lack of counsel caused events which so infected the trial that Petitioner was prejudiced thereby. *Stroble v. California*, 343 U.S. 181, 96 L. Ed. 872, 72 S. Ct. 599.

There are no such facts here. Defendant repeatedly refused counsel during the period in question and, only after such refusals, then made the confession which assisted in his conviction. In view of his waiver of counsel and his subsequent admission of guilt we think he cannot now be heard to complain that he was deprived of his rights under the Sixth Amendment.

CONCLUSION

1.

While the admission of a confession obtained during a lengthy period of detention from a defendant without counsel, and who has not been arraigned, raises a question of

abuse of the petitioner's rights under the Fourteenth Amendment, when not accompanied by other facts showing the same to have been involuntarily given, this Court under its previous holdings should accept the determination of the triers of fact as to its voluntariness.

2.

The defendant is entitled to the assistance of zealous and earnest counsel from arraignment to final argument but absence of counsel prior to the arraignment denies Federal Constitutional protection only when the absence results in a denial to the accused of the essentials of justice: Where, as here, during the period of detention the defendant continually refuses assistance of counsel and only after such refusal makes a confession of guilt, there can be no denial to the accused of such essentials of justice.

Respectfully submitted,

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APPEARANCE

I, Freeman H. Forrest, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as counsel for the State of Iowa, Respondent.

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